

*See Vol.  
3387*

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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METLOX MANUFACTURING COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 20,299 ✓

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PETITION FOR REHEARING

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FILED

MAR 14 1967

WM. B. LUCK, CLERK

MAR 27 1967

SHEPPARD, MULLIN, RICHTER & HAMPTON

458 SOUTH SPRING STREET  
LOS ANGELES, CALIFORNIA 90013



1 TO THE HONORABLE JUDGES OF THE UNITED STATES  
2 COURT OF APPEALS FOR THE NINTH CIRCUIT:  
3

4 The errors in this Court's present decision place  
5 this cause squarely in conflict with the Board's own  
6 published interpretation of its own order in this case and  
7 with decisions of the United States Supreme Court and of  
8 another Court of Appeals.  
9

10 The two-to-one divergence between Judges Washington,  
11 Browning and Barnes underscores these errors and conflicts,  
12 and calls for rehearing en banc.  
13

14 THE ERRORS  
15

16 Metlox claimed inability to pay and substantiated  
17 this by supplying profit and loss statements to the Union  
18 and by offering to give a certified public accountant chosen  
19 by the Union unlimited and carte blanche access to the  
20 Company's books to verify the accuracy of the claim.  
21

22 In view of Metlox's offer of complete substantiation  
23 of its claim of economic inability, it is error for this  
24 Court to hold that Metlox did not bargain in good faith, and  
25 it is error for this Court to say (1) that this case "turns  
26 on the extent to which" Metlox must disclose to the Union the



1 salaries paid to management, (2) that the profit and loss  
2 statements did not disclose sufficient information from  
3 which a fair judgment could be made by the Union as to the  
4 Company's claimed inability to pay, and (3) that the infor-  
5 mation as to payments to management, denied by the Company,  
6 were "relevant" and "reasonably necessary" to the Union.  
7 All of these matters are irrelevant to whether Metlox, in  
8 good faith, claimed inability to pay. The only issue in this  
9 case is whether Metlox made the claim in good faith, not  
10 whether it was right in its business decision as to what it  
11 could, or could not, afford to do.

12  
13 The majority opinion of this Court goes far beyond  
14 and is in direct conflict, not only with decisions of the  
15 Supreme Court and another Court of Appeals, but with the  
16 Board's own interpretation, in another case, of its own  
17 decision in this case. In that other case, the Board says  
18 that its own decision in this case does not stand for that  
19 which this Court has said it stands, and says that nothing  
20 more is required as evidence of Metlox's good faith than  
21 that which Metlox in fact offered. Such disclaimer by the  
22 Board in that other case shows not only that the Board's  
23 conclusion in this case that Metlox exhibited lack of good  
24 faith is wrong, but that the Board has led this Court into  
25 the error of compounding the Board's error. As Judge Barnes  
26 said, "I believe that if the Board's order is enforced as it



1 stands, this case will make law beyond the implications of  
2 the facts of this case."

### 3 4 THE CONFLICTS

5  
6 1. This Court's decision in this case is in square  
7 conflict with the Board's own published statements in White  
8 Furniture Co., 161 NLRB No. 23, 63 LRRM 1277 (1966) that, in  
9 the Metlox case,

10  
11 a. "The Board has also declined to require an  
12 employer [Metlox] to give a union such sensitive in-  
13 formation as executive salaries and detailed break-  
14 downs of operating expenses." (63 LRRM at 1278); and

15  
16 b. "The Board there [in Metlox] approved a check  
17 of the employer's books by a union accountant,  
18 limited to the purposes of verifying profit and loss  
19 figures offered by the employer and determining  
20 whether there were any factors that would make the  
21 employer's figures misleading." (63 LRRM at 1278.)

22  
23 2. This Court's decision in this case is in square  
24 conflict with the United States Supreme Court's decision in  
25 NLRB v. Truitt Manufacturing Co., 351 U.S. 149, 100 L. ed  
26 1027, 76 S. Ct. 753 (1955),





1           a. that where an employer claims inability to  
2 pay a wage increase, good faith bargaining requires  
3 only that the claim be an honest claim and that, as  
4 Metlox did here, the employer need do no more than  
5 furnish "some sort of proof of its accuracy"  
6 (351 U.S. at 152-153, 100 L. ed at 1032); and  
7

8           b. that a claim of economic inability to pay a  
9 wage increase does not automatically entitle the  
10 employees to substantiating evidence (351 U.S. at  
11 153, 100 L. ed at 1032).  
12

13           3. This Court's decision in this case is in square  
14 conflict with the Court of Appeals for the District of  
15 Columbia's decision in Fruit and Vegetable Packers v. NLRB,  
16 316 F. 2d 389 (D.C. Cir. 1963),  
17

18           a. that a company, as Metlox did here, may cir-  
19 cumscribe the manner in which it makes its books  
20 available for inspection (316 F. 2d at 390-391); and  
21

22           b. that the Board was correct in repudiating in  
23 its decision affirmed in Fruit and Vegetable Packers  
24 (Yakima Frozen Foods, 47 LRRM 1472, 1473-1474) state-  
25 ments of principle and law inconsistent with the  
26 doctrine that



1 "Under the Truitt principle, the obligation  
2 to furnish substantiating evidence does not  
3 'automatically' follow a claim of inability to  
4 pay, nor is the employer obligated to substan-  
5 tiate the claim; it is enough if the employer  
6 [as Metlox did here] in good faith attempts to  
7 substantiate it." (Affirmed 316 F. 2d 389.)  
8

9 THERE SHOULD BE REHEARING EN BANC  
10

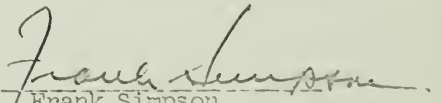
11 Because of the divergence between the opinions of  
12 Judges Washington, Browning and Barnes, and because of the  
13 conflicts between this Court's decision and the decisions of  
14 the United States Supreme Court and the Court of Appeals for  
15 the District of Columbia and the Board's own interpretation  
16 of its own decision in this case, petitioner respectfully  
17 suggests that a rehearing en banc is the only appropriate  
18 way to resolve these conflicts.

19 DATED: March 7, 1967.

20 Respectfully submitted,

21 SHEPPARD, MULLIN, RICHTER & HAMPTON

22  
23 By

  
Frank Simpson  
Attorneys for Petitioner  
Metlox Manufacturing Company



CERTIFICATE OF COUNSEL



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I, the undersigned, say that I am and was at all times herein mentioned a citizen of the United States and a resident of the County of Los Angeles, California, over the age of 18 years and not a party to the within action; that my business address is 458 South Spring Street, Los Angeles, California 90013; that on March 7, 1967, I served the PETITION FOR REHEARING dated March 7, 1967, on the below-named counsel in said action, by depositing true copies thereof, enclosed in sealed envelopes with postage thereon fully prepaid, in a mail-box regularly maintained by the United States Government at 458 South Spring Street, Los Angeles, California addressed as follows:

General Counsel  
National Labor Relations Board  
21st Region  
849 South Broadway  
Los Angeles, California 90014  
Attention: George A. Pappy, Esquire

Alfred M. Klein, Esquire  
Messrs. Rose, Klein & Marias  
315 West Ninth Street  
Los Angeles, California 90015  
(on behalf of International Brotherhood  
of Operative Potters, AFL-CIO)

Plato E. Papps, Esquire  
1300 Connecticut Avenue  
Washington 6, D. C.  
(on behalf of International Brotherhood  
of Operative Potters, AFL-CIO)





1 and three copies of the above-named documents to:

2 Marcel Mallet-Prevost, Esquire  
3 Assistant General Counsel  
4 National Labor Relations Board  
5 Washington, D. C. 20570

6 I declare under penalty of perjury that the  
7 foregoing is true and correct.

8 Executed on March 7, 1967, at Los Angeles,  
9 California.

10  
11   
12 Grace Gelches

